

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Affidavit

77-4084

To be argued by
RICHARD J. LEON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4084

CAROL PRYCE,

Petitioner,

—against—

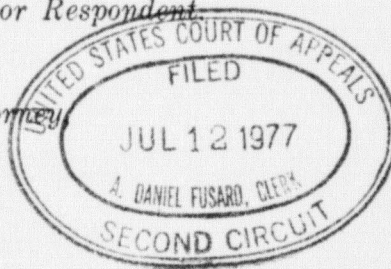
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

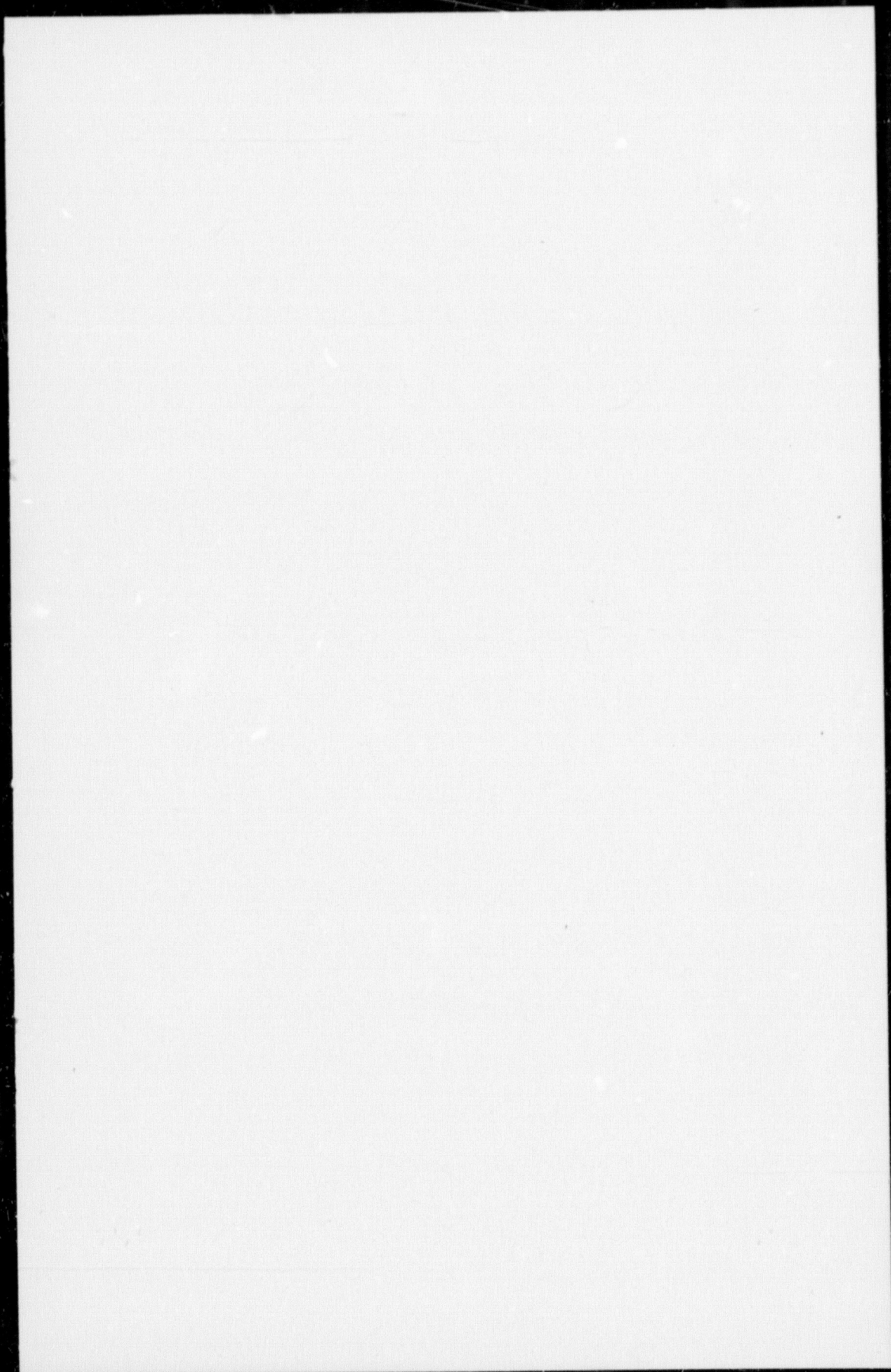
PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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ERRATA

Page 3, footnote 3, line 5. For "aliens" read "alien."

Page 6, nineteenth line. For "Grizzle and in English, to investigators Devine and office and gave a sworn statement, in the presence of Grizzle," read "Grizzle's entry, she proceeded to the Service's Rochester office and gave a sworn statement in the presence of Grizzle."

Page 8, eighth line. For "service" read "Service."

Page 9, footnote 13, line 25. For "render" read "renders."

Page 16, first line. For "same" read "some."

Page 17, eleventh line. For "*Ribeiro*" read "Ribeiro."

Page 18, nineteenth line. For "tools" read "tolls."

Page 19, eighth line. For "App." read "Appeals."

Page 22, footnote 21, line 5, For "R D" read "R-D."

Page 23, second line. For "her" read "herself."

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4084

CAROL PRYCE,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a, Carol Lamington Pryce ("Pryce"), petitions this Court to review a final order of deportation of the Board of Immigration Appeals (the "Board") entered on November 22, 1976. That order dismissed Pryce's appeal from the order and decision of Immigration Judge Gordon W. Sacks wherein Judge Sacks found Pryce deportable under Section 241(a)(13) of the Act, 8 U.S.C. § 1251(a)(13), by reason of his having knowingly and for gain, assisted an alien to try to illegally enter the United States on October 1, 1973.

Issue Presented

Whether the Board of Immigration Appeals' decision that Pryce is deportable under Section 241(a)(13) of the Act is based upon reasonable, substantial and proba-

tive evidence in the record. Section 242(b)(4) of the Act, 8 U.S.C. § 1252(b)(4).

Statement of Facts

The petitioner, a 27 year old native and citizen of Jamaica, entered the United States on June 28, 1969 as a lawful permanent resident to join his mother, Vera Pryce, in Rochester, New York. (AR 93, 98).¹ At that time, he was single, had never married and had a job awaiting him in the United States. (AR 93-97).

In May 1971, nearly two years later, Pryce returned to Jamaica to marry Monica Terill, a native and citizen of that country. (AR 131). Monica Terill Pryce ("Monica") entered into this marriage for the sole purpose of coming to the United States. (AR 80, 121).² After their marriage, Pryce returned to Rochester and began

¹ References in this brief preceded by the letters "AR" are to the certified administrative record previously filed with this Court.

² Pryce's reasons for marrying Monica, however, seem more complex. Although he noted in his testimony that he married her because she wanted to come into the country (AR 87), it appears that the real reason was to help his brother, Barrington Pryce. (AR 86). The record indicates that Barrington and Monica had had two children together in Jamaica (Munoz and Barrington, Jr.) prior to Monica's marriage to Carol (AR 138). Subsequently Barrington came to the United States as a lawful permanent resident (AR 139), and settled in Rochester, New York. His children however, were still in Jamaica living with Monica. (AR 138). Since Barrington had legally married another woman (AR 88), he was not able to go to Jamaica in 1971 to marry Monica and bring his children back to the United States. So, Carol, "being the nice character he is" (AR 86-87), agreed to marry Monica thereby making it possible for Barrington's children to be brought into the United States. Note, however, that Barrington's son, Munoz, as of November 1973 was living in Rochester with his father having somehow managed to enter the United States. (AR 139).

applying to the Service for the necessary papers to obtain a permanent resident visa for Monica.³ (AR 87). In August of 1971 Pryce started working for the Xerox Company in Rochester, having previously worked for Kodak. (AR 82).

On June 30, 1973, Monica entered the United States with a permanent resident's visa. (AR 131). She lived with Pryce for a month in order to facilitate the charade of their phoney marriage, and then moved to a separate apartment in Rochester. (AR 132). On or about September 22, 1973, Monica told Pryce that a "friend" of hers, Keith Ludlow Fitzhugh Grizzle ("Grizzle"),⁴ a native and citizen of Jamaica, had arrived in Canada from Jamaica and asked him if he could get someone to "sponsor" ⁵ Grizzle's entry into the United States. (AR

³ Under Sections 202 and 203 of the Act, 8 U.S.C. § 1152 and 1153, Congress has enacted certain numerical limitations on the number of permanent resident visas that are available to citizens of other countries. Section 203(a)(2) of the Act, 8 U.S.C. Section 1153(a)(2), provides that an alien's spouse of a lawful permanent resident of the United States will receive preferential status in the availability of permanent resident visas. Monica, by virtue of her marriage to Pryce, became eligible for this status and accordingly was capable of getting this type of visa within a shorter period of time than otherwise possible.

⁴ Monica's characterization of Grizzle as a "friend" bears amplification. In a sworn statement given to Service investigators on November 10, 1973, Monica indicated that prior to her entry into the United States in June of 1973, she had lived with Keith Grizzle for five years. (AR 138). During that time they had a child, Michelle. (AR 138). Their "common law relationship" (AR 133) was maintained and flourished after her "marriage" to Carol Pryce which was designed to bring her to this country. Moreover, before leaving Jamaica she had planned with Grizzle to bring him to the United States (AR 119, 133) and did in fact arrange with Pryce later to execute this plan. (AR 134-135).

⁵ Although the word "sponsor" customarily has a ring of propriety, that is not the case here. Grizzle never applied for a visa to the United States and consequently could not have been

[Footnote continued on following page]

134). Pryce agreed to "see if he could find anyone that could bring [Grizzle in]." (AR 134). Three days later he contacted Monica, and told her that he had a "friend", Leroy Stefus (a/k/a "Kilo") (AR 4, 135), who could help Grizzle and that it would cost \$300 to bring Grizzle into the country. (AR 135). Additionally, he asked Monica for Grizzle's height and age in order to procure accurate documents for his entry. (AR 185). After obtaining this information, Pryce told Monica he would contact her later for Grizzle's name⁶ and address in Toronto. (AR 135).

Later that day, Monica contacted Grizzle and informed him that somebody would pick him up in Toronto and it would cost \$300; half of which he would pay and the other half she would pay. (AR 136). Four days later, September 29, 1973, Pryce phoned Monica at her apartment to finalize the details. (AR 135). She informed Pryce of Grizzle's name and address and Pryce told her that Grizzle would be picked up the following Monday, October 1, 1973. (AR 135).

On Monday morning, Pryce and Kilo drove to Toronto to pick up Grizzle (AR 111). When they and an unidentified woman⁷ arrived at Grizzle's address, Pryce

legally "sponsored" by anyone. See Section 211 of the Act, 8 U.S.C. § 1181. It is clear that Monica was using this word to describe a person who had the means and ability to bring Grizzle into the United States illegally without detection by Immigration authorities. The best word to fit that description is "smuggler".

⁶ Pryce states in the record that prior to their meeting in Toronto on October 1, 1973 he had never met Grizzle (AR 29, 137). Consequently his inquiry regarding Grizzle's name, height and age was not surprising.

⁷ The record does not indicate who this woman passenger was who arrived with Pryce and Kilo in Toronto, what relationship, if any, she had to Pryce and/or Kilo, and where she joined them in this journey.

presented him with three separate identification cards: a New York State driver's license, a Xerox employee's identification card, and a blood donor's card. (AR 123). Each identification was in the name of a Manning McCutchen (AR 123). Pryce instructed Grizzle that he was to present the driver's license as his identification at the border, and, if questioned, to inform the Immigration Inspector that he was a United States citizen born in Miami. (AR 127). If the Inspector asked for additional identification, he was instructed to produce the other cards and to tell him he worked for Xerox and was returning to his home in Rochester.

After loading the car, Kilo drove to a nearby subway station (AR 122). Pryce got out of the car and removed the luggage from the vehicle.⁸ Pryce also took Grizzle's passport and return ticket to Jamaica, and caught a train to the airport, where he got a plane to Buffalo, New York⁹ (AR 123). The purpose of the flight was to bring the luggage into the United States in a manner that would avoid arousing the suspicions of the Immigration authorities at the border. (AR 123). Kilo and the two others, meanwhile, proceeded back to Rochester by car.

Upon arriving at the border at Lewiston Bridge, New York and in the course of a routine questioning, Grizzle

⁸ In his sworn statement given to Service investigators on the day of his attempted entry, Grizzle stated that Pryce took other luggage besides his on the plane to Buffalo. (AR 123). Among the potential explanations for this added luggage is the possibility that it was owned by the unidentified woman accompanying them in the car.

⁹ The record indicates that Pryce placed a collect call to Monica from the airport in Buffalo, New York on the evening of October 1, 1973 to find out whether Grizzle had arrived. (AR 136-137).

informed the Immigration officer, as Pryce advised him, that he was an American citizen returning from Canada. (AR 128). The Immigration inspectors suspected an illegal entry and took all three of them into custody. Later that day, Grizzle, under oath and in the presence of a Service investigator gave a sworn statement explaining the events surrounding his entry and implicating both Monica and Pryce. (AR 114). Grizzle remained in the Service's custody for 12 days (AR 43), and was released on a \$2,500 bail (AR 43) as a parolee¹⁰ pending his future testimony in prosecutions to be conducted as a result of this smuggling attempt. (AR 35). He immediately proceeded to Rochester, New York to live with Monica. (AR 61).

On November 10, 1973, Monica was visited by Service investigator William C. Devine at her apartment in Rochester (AR 75). After asking her to provide the Service with information regarding her involvement in Grizzle and in English, to investigators Devine and office and gave a sworn statement, in the presence of Grizzle, and in English to investigator's Devine and Lawrence Solinski. (AR 130). In her statement Monica detailed her arrangement with Pryce to bring Grizzle into the United States illegally and unqualifiedly related that she was to pay \$150 to Pryce after Grizzle was

¹⁰ Under Section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20), Grizzle was excludable from the United States because he did not have in his possession the necessary valid documents for entry. The Attorney General, however, by virtue of his power under Sections 212(d)(5) and (6) of the Act, 8 U.S.C. § 1182(d)(5) and (6), has delegated to the Service's District Directors the discretionary authority to parole excludable aliens into the United States temporarily in order to serve the public interest (i.e. testify for the Government in the prosecution of a smuggler). 8 C.F.R. 212.5(a). Moreover, the District Directors are empowered to require the excludable alien to post a bond during the pendency of his parole. *Id.*

in the country. (AR 136). Monica explained in her statement, however, as Grizzle had in his earlier statement (AR 124), that no money was ever actually paid to Pryce. (AR 138).

Thereafter, on January 22, 1974, a Federal Grand Jury issued an indictment charging Pryce with attempting to unlawfully bring an alien into the United States in violation of Section 274(a)(1) of the Act, 8 U.S.C. § 1324(a)(1)¹¹, and conspiring to commit this offense in violation of 18 U.S.C. § 371.¹² (AR 109-113). On January 6, 1975, after a trial in which both Monica and Grizzle testified, Pryce was found guilty on two of the

¹¹ Section 274 of the Act, 8 U.S.C. § 1324, states in pertinent part that:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who— * * *

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs.

¹² Section 371 of title 18 of the United States Code provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

three counts in the United States District Court in Buffalo, New York. (AR 108). On January 13, 1975, Pryce was sentenced to serve one year on each count; the sentences were to run concurrently. (AR 108). Less than two weeks later, January 30, 1975, Monica died. (AR 129).

On October 8, 1975, nine days prior to the completion of his incarceration the service instituted deportation proceedings against Pryce by issuing an Order to Show Cause and Notice of Hearing charging him with knowingly and for gain, aiding and directing an alien to try to enter the United States in violation of Section 241 (a) (13) of the Act, 8 U.S.C. § 1251(a) (13). (AR 91). The next day, Pryce was personally served with a copy of this order at the Steuben County Jail in Bath, New York (AR 18), which, in addition, directed him to appear at the Service's Buffalo office on October 20, 1975 for his deportation hearing. (AR 91). Pryce was released from the jail on an Immigration bond on the evening of October 17th (AR 18) and appeared before Immigration Judge Gordon W. Sacks on the morning of the twentieth. (AR 18). In order to afford Pryce and his counsel more time to prepare his defense, Judge Sacks adjourned Pryce's proceedings until October 30, 1975. (AR 19). A subsequent adjournment was granted Pryce until November 14, 1975. (AR 20).

Pryce and his counsel returned to the Service's Buffalo office for his adjourned hearing on November 14, 1975. At the outset Pryce conceded that he was returning to the United States as a resident on October 1, 1973 and that he had aided Grizzle in attempting to enter the United States. (AR 23-28). In addition, it was agreed that the sole issue before Judge Sacks was whether or not Pryce's actions to assist Grizzle had been, as proscribed by the statute, "for gain." (AR 23). The Government, besides questioning Pryce, called Grizzle and in-

investigator Devine as witnesses. Although Grizzle admitted that they did not know prior to his entry who he would pay his share of the money to, he testified that upon arriving in Rochester in October 1975, he was informed by Monica that he was supposed to have paid his \$150 share to Pryce when they picked him up in Canada. (AR 43). Investigator Devine, having questioned Monica in her sworn statement in November 1975, was presented as a witness in order to create a sufficient foundation for the introduction into evidence of the sworn statement of the deceased Monica (AR 68).¹³ Satisfied

¹³ In his brief, Pryce contends that the introduction into evidence of Monica's sworn statement denied him the opportunity of cross-examination and consequently rendered his hearing unfair and violative of his due process rights. This argument, unsupported by any case authority, is frivolous.

Section 242.14(c) of the Code of Federal Regulations provides in part, that an Immigration Judge "may receive in evidence any . . . written statement which is material and relevant to any issue in the case previously made by . . . any other person during any investigation, examination, hearing or trial." Moreover, the Courts have held that the strict rules of evidence are not binding on the Immigration Service's administrative tribunals and that the introduction of an *ex parte* statement of a witness who can not be produced for cross-examination does not render a hearing unfair. *Navarrette-Navarrette v. Landon*, 233 F.2d 234, 237 (9th Cir.), cert. denied, 351 U.S. 911 (1955); *United States ex rel. Impastato v. O'Rourke*, 211 F.2d 609, 611 (8th Cir. 1954); *Margano v. Pilliod*, 299 F.2d 217, 219 (7th Cir. 1962); *Strantzalis v. Immigration and Naturalization Service*, 465 F.2d 1016, 1018 (3d Cir. 1972). Consequently, since Monica's sworn statement on November 10, 1973 was particularly material and relevant to the issue of Pryce's deportability, it was properly admitted.

Finally, Pryce contends in his brief that Monica's failure to sign her name on the transcription of the tape recording of her sworn statement *ipso facto* render her statement inadmissible because she never had an opportunity to listen to the tape recording of her statement and make any corrections or amendments to the transcript which she thought necessary. Brief for Petitioner at 13. This argument was raised at Pryce's deportation hearing by his counsel

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with investigator Devine's introductory testimony, Judge Sacks permitted Monica's statement into evidence, and informed both the Government and Pryce's counsel that he alone would determine the content of her statement. (AR 64).¹⁴ During the course of investigator Devine's

in reaction to a particular passage in the transcription he contended to be undecipherable. (AR 70-7). At that time the Government offered to introduce the actual recording into evidence but Pryce's counsel again contended that without Monica to overhear and verify the translation it was prejudicial and valueless (AR 71). Immigration Judge Sacks responded by overruling Pryce's objection and assuring his counsel that he would decide from reading and evaluating the transcript whether the portion was undecipherable and what value it should have. (AR 71). Not only was Judge Sack's decision reasonable, it was also eminently fair. Monica's statement was given under oath in the presence of two Immigration investigators. The transcription of this proceeding was certified by a trained stenographer to be "a true and correct transcription" of the taped record. (AR 140). Like the transcript of a Court proceeding which is preserved by a stenographer on stenotype in the Courtroom and transcribed later, it is an official transcription of the proceedings. Pryce's counsel's contention, in effect, that all stenographers' certified transcriptions of proceedings should not be introduceable as evidence until all parties previously present can review after that fact their statements and make corrections, is totally impractical and contrary to established practice in all administrative and judicial tribunals.

¹⁴ Pryce claims in his brief that the Government produced investigator Devine for the purpose of corroborating Monica's sworn statement on November 10, 1973. Brief for Petitioner at 13. Not only is this assertion false but it is completely contrary to the transcript of the record of proceedings relating to Mr. Devine's questioning (AR 63-76).

Investigator Devine was produced by the Government for the sole purpose of establishing a foundation in the record for the introduction of Monica's statement into evidence. (AR 62-63). The questioning of investigator Devine by the Government was limited to eliciting general information about when, where and how Monica's statement was taken. (AR 63-64). In fact, after Judge Sacks accepted the statement into evidence, it was Pryce's

[Footnote continued on following page]

examination, it was established that Monica had stated that she would pay her \$150 share to Pryce once Grizzle came into the country. Pryce only offered in defense of these corroborated statements his consistent assertion that he never received anything for his services. (AR 28). At no time did he attempt to explain the motives behind his actions, the extent of his involvement in comparison to his friend Kilo's or the expenses he incurred in the planning and execution of their attempted smuggling. Finally, Pryce requested the discretionary relief of voluntary departure¹⁵ in the event Judge Sacks found him deportable. (AR 74). Because he anticipated receiving briefs and transcripts before finally deciding Pryce's deportability, Judge Sacks heard testimony from Pryce regarding voluntary departure (AR 76-88), and thereafter closed the hearing. (AR 59).

On June 3, 1976, Immigration Judge Sacks issued a written decision finding Pryce deportable under Section 241(a)(13) of the Act, 8 U.S.C. 1251(a)(13), and denied his request for voluntary departure. In his opinion, Judge Sacks found that the Government, on the basis of the corroborated testimony of Grizzle and the sworn

counsel who sought to have the investigator "*interpret*" portions of the record (AR 73) and the Government objected, contending that Judge Sacks alone was to decide the meaning and content of Monica's statements (AR 73). For Pryce to contend that his hearing was unfair because the Government sought to impermissibly use investigator Devine to corroborate Monica's statement, is at best, incredulous.

¹⁵ See Section 244(c) of the Act, 8 § 1254(c), and 8 U.S.C. § 244. This relief can be granted if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted, it removes the stigma of an order of deportation from the alien's record and thus facilitates any future lawful reentry into this country which he might wish to make. See Section 212(a)(17) of the Act, 8 U.S.C. 1182(a)(17).

statement of Monica, had sufficiently established through clear, convincing and unequivocal evidence that Pryce had acted on a promise of gain, to aid, abet and assist Grizzle to illegally enter the United States. (AR 15). Accordingly, he entered an order for Pryce's deportation to England (the country of Pryce's choice) and in the alternative Jamaica, in the event that England refused to accept Pryce. (AR 15). Furthermore, Judge Sacks found Pryce statutorily ineligible for the discretionary relief of voluntary departure and therefore denied that request. (AR 15). Two weeks later, January 17, 1976, Pryce appealed Judge Sacks' decision to the Board of Immigration Appeals, claiming that the Judge's finding of his deportability was not supported by clear, convincing and unequivocal evidence (AR 10).

On November 22, 1976, the Board issued a written decision, upholding Judge Sacks' decision and dismissing Pryce's appeal. (AR 1). In its opinion the Board, after evaluating all the evidence submitted with the appropriate deference accorded to the superior capability of the trial judge to assess the credibility of the witnesses before him, concluded that there was "clear, convincing and unequivocal evidence" to support Pryce's conviction. (AR 5).

Nearly four months later, April 12, 1977, Pryce filed a petition for review in this Court seeking to set aside the Board's decision. Consequently, Pryce has remained in the United States pursuant to the automatic stay of deportation which accompanies every petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statute

Immigration and Nationality Act, 63 Stat. 163 (1952)
as amended:

Section 241, 8 U.S.C. § 1251

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

ARGUMENT

The Board's Determination That Pryce's Deportability Was Established By Clear, Convincing, And Unequivocal Evidence Is Supported By Reasonable, Substantial And Probative Evidence In The Record.

Both Immigration Judge Sacks and the Board found that the Government had met its burden under *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 286 (1966), of proving Pryce's deportability by "clear, convincing, and unequivocal evidence." The scope of review of the Board's decision is extremely narrow. Applying the Supreme Court's standard stated in *Woodby* the Board's decision can only be reversed if there is no reasonable, substantial, and probative evidence in the record to support the Board's finding of deportability. *Id.* at 282-83.

Pryce claims there is no such evidence in the record. He claims that the Government failed to prove that he an-

anticipated making a "profit" in return for his assistance to Grizzle. Reduced to its essence, it is Pryce's claim that his actions were motivated out of "love" for his "wife" Monica. An analysis of the applicable administrative and judicial decisions, as well as the testimony contained in the record, establishes the propriety of the Board's deportation order. This petition should be dismissed.

A. Section 241(a)(13) Of The Act, 8 USC § 1251(a)(13) Requires That The Alien's Actions Were Motivated By At Least An Anticipated Gain

Section 241(a)(13) of the Act, 8 U.S.C. 1251(a)(13) states that any alien in the United States shall, upon order of the Attorney General, be deported who

prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly, and for gain, encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of the law.

In order for an alien to be convicted under this section the Government must show that his actions in furtherance of this illegal entry were done "for gain." The gain which motivates the alien's action need not materialize, however, in order to sustain a conviction. If the Government shows an "anticipated gain" it has satisfied this statutory requirement. *In the Matter of R-D-*, 2 I & N Dec. 758 (A.G. 1947); *Matter of P-G-*, 7 I & N Dec. 514 (1957); *Matter of B-G-* 8 I & N Dec. 182 (1958); See also *Gallegos v. Hoy*, 262 F.2d 665 (9th Cir. 1958); *Ribeiro v. Immigration and Naturalization Service*, 531 F.2d 179 (3d Cir. 1976).

Additionally, the "gain" which the alien anticipates need not necessarily be monetary. See Gordon and Rosen-

field, *Immigration Law and Procedure*, Section 4.19 at 4-169 (Rev. Ed. 1976). Attorney General Clark characterized gain as some "advantage" or "benefit" which the alien anticipates, *In the Matter of R-D-* *supra* at 766, and the Ninth Circuit has held that anticipation of domestic services from the smuggled alien constitutes a gain. *Gallegos v. Hoy*, *supra* at 666.

When money is the expected reward, however, the Board has held that it does not matter how small the amount is which the alien anticipates receiving. *Matter of P-G-* *supra* at 517, *Matter of B-G-* *supra* at 184. In fact, the promise to pay the smuggler enough to cover the cost of his gasoline has been held by the Board in many cases to constitute an "anticipated gain." *Id.* Accordingly, it was incumbent upon the Government to show that Pryce anticipated receiving some benefit, advantage or financial reward in return for his assistance to Grizzle. With this in mind, we now turn to examine Pryce's allegation that the Government had the *added* burden of proving what expenses Pryce anticipated incurring and what part of the money he expected to receive he anticipated allocating to these expenses.

B. An Alien smuggler charged with deportability under Section 241(a)(13), 18 U.S.C. § 1251(a)(3), has the burden of coming forward with evidence of the Expenses He Anticipated and or realized in Assisting another alien to enter the Country Illegally

As noted earlier in the statement of facts, the record indicates that Pryce was never paid any money by either Monica or Grizzle for his assistance in attempting to bring Grizzle into the United States illegally (AR 43, 138). Consequently, for the Government to deport him under Section 241(a)(13) it had to prove that he anticipated receiving

same gain (i.e. benefit, reward, advantage) for his efforts. In meeting that burden, the Government relied on Grizzle's testimony at Pryce's deportation proceedings, a sworn statement Grizzle had given to a Service investigator, which was admitted into evidence without objection (AR 38), and a sworn statement Monica had given to the Service prior to her death. The thrust of these evidentiary sources was that Pryce anticipated being paid at least \$150 from Monica at some time after Grizzle entered the country. In his brief Pryce contends that in order for the Government to have fulfilled its burden of proof under Section 241(a)(13), it had to not only show the amount of money he anticipated receiving but, in addition, what if any expenditures he anticipated having to incur. This contention is premised on a definition of "gain" recently stated in an opinion by the Third Circuit.

In *Ribeiro v. Immigration and Naturalization Service*, *supra* at 180, the Third Circuit defined "gain" as "requiring the prospect of an excess of tangible return over expenditure in a particular transaction". Applying this profit orientated definition to this case, Pryce is apparently arguing that the Government's showing of his prospective receipt of money did not necessarily prove that he anticipated making a "gain" (excess of tangible return over expenditure). Accordingly, Pryce asserts that the Government had to also show anticipated expenditures in order for the trier of fact (Immigration Judge) to subtract this from the anticipated return and thereby determine whether he anticipated making a profit. Putting aside the possibility that an alien might be a bad businessman¹⁶ and even accepting for the sake of argument the

¹⁶ It is wholly possible, theoretically, that an alien might intend to assist another into the United States illegally but because he miscalculated his anticipated expenses, he ultimately lost money instead of turning a profit. In such a case he would be still deportable under Section 241(a)(13) of the Act, for Congress surely did not intend to prosecute only the accomplished and professional smuggler.

Third Circuit's definition, of gain,¹⁷ respondent contends that a review of the *Ribeiro* decision and the application of a fundamental principle of evidence disposes of Pryce's argument.

In *Ribeiro* the Third Circuit, as in this case, had to decide whether the Immigration Judge's finding of deportability under Section 241(a)(13), was supported by reasonable, substantial and probative evidence. Although the record clearly indicated that the smuggler Ribeiro expected to receive a \$150 payment once the smuggled aliens arrived in the United States, *Ribeiro*, unlike Pryce testified that \$100 of this fee was reimbursement for the \$100 he had paid to the drivers who went to Canada to get the aliens and the other \$50 was to cover the expenses he would incur driving from Newark to a rendezvous spot outside of Albany, New York to meet the drivers and collect the \$150.00 payment. The Third Circuit, in reversing the Board's decision finding Ribeiro deportable, applied its definition of "gain" and calculated that the \$150 Ribeiro would receive barely covered the expenses

¹⁷ The Third Circuit characterized the definition of "gain" it employed in *Ribeiro* as being a "common sense interpretation of the phrase" which it resorted to in the absence of any showing by the Immigration and Naturalization Service of a "statutory or regulatory provision defining 'gain' in this context." *Ribeiro v. Immigration and Naturalization Service*, *supra* at 180. This definition is remarkably narrow when viewed in light of the Board of Immigration Appeals' previous interpretation of gain as being a "benefit" or advantage" not necessarily pecuniary in nature. See cases, treatise and discussion in subsection A *supra* of this Brief. Perhaps, ultimately, every advantage, benefit or service that one gains in return for his assistance will have a pecuniary value. However, for the Government to have to prove in each particular prosecution under Section 241(a)(13) what the exact future monetary value of the advantage or service was anticipated being or in fact was is an onerous burden which would stifle prosecutions and render this Section of the Act unenforceable. For this reason respondent contends that the *Ribeiro* Court's definition of gain was excessively narrow.

he incurred traveling from Newark to Albany. Accordingly, the Court concluded that Ribeiro's supposed anticipation of making a "gain" (excess of tangible return over expenditure) was not supported by "reasonable substantial and probative evidence" in the record. *Ribeiro v. Immigration and Naturalization Service supra* at 181. The Court did, however, note that if the record contained "no evidence of offsetting expenses or losses contemplated" the Government's showing that the smuggler "was to receive a modest sum of money for his part in the endeavor . . . may well be sufficient to support a finding that the alien acted 'for gain'." *Id* at 180. This, respondent contends, is the exact situation in the present case.

There is no evidence in the record to indicate that Pryce anticipated or incurred any expenses or losses as a result of his involvement in the plan to smuggle Grizzle into the United States. The facts, however, indicate that numerous potential and/or actual expenses were incurred (i.e., the cost of gas, tools, the airline ticket from Toronto to Buffalo, cost of the documents (assuming they weren't stolen), and payment for Kilo as the driver, etc.).¹⁸ Pryce apparently contends that the Government had to show which, if any of these expenses, he incurred in order to have enabled Immigration Judge Sacks to calculate whether he anticipated making a profit ("gain"). The Government contends that even if this Court applies the *Ribeiro* Court's narrow definition of gain, absent a showing by Pryce of any expenses anticipated or losses incurred, the Government sufficiently demonstrated that he anticipated a "gain".

¹⁸ The automobile used by Pryce and Kilo was borrowed by Pryce. (AR 111). Moreover, Kilo had an additional unidentified female passenger in the car on the return trip to Toronto. (AR 122). It would not be fair to attribute all of these potential expenses to the smuggling of Pryce into the United States.

If is a fundamental and well established principle of the law of evidence in both civil and criminal cases that a litigant does *not* have the burden of establishing facts peculiarly within the knowledge of his adversary. *Campbell v. United States*, 365 U.S. 85, 96 (1971); *Browzin v. Catholic University of America*, 527 F.2d 843, 849 (D.C. Cir. 1975); *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 36 (7th Cir. 1975); *Edwards v. United States*, 334 F.2d 360, 366 (5th Cir. 1964); *G.E.J. Corp. v. Uranium Aire, Inc.*, 311 F.2d 749, 751 (9th Cir. 1962); *Zeeman v. United States*, 275 F. Supp. 235, 251 (S.D.N.Y. 1967); Wigmore, *Wigmore on Evidence* § 2486, at 275 (3d ed. 1940); C. Torcia, *Wharton's Criminal Evidence* § 14, at 21 (13th ed. 1972). Although no reported decision can be found applying this principle to a Section 241(a)(13) proceeding, the Government contends that as a matter of policy and fairness it is particularly appropriate to do so for the following reasons.

Smugglers, whose actions are motivated by financial rewards, will obviously charge more money than they anticipate having to expend. If the smuggler operates alone, only he will know what expenditures he anticipated and how much "profit" he hoped to make. Unless the smuggler shoulders the burden of presenting his anticipated expenditures, it will be virtually impossible for the Government to prosecute him under Section 241(a)(13). Likewise, in a multi-smuggler operation, a ring-leader who has carefully limited his operational information among his co-conspirators would, like the sole-practitioner, be impossible to prosecute because he alone would know all the anticipated expenses. Common sense, experience and fairness dictates that the knowledge of anticipated expenses and losses actually incurred are facts peculiarly within the knowledge of the smuggler and he therefore should bear the burden of producing evidence

of their existence.¹⁹ Although the risk that smugglers will lie to show anticipated *losses* and altruistic motives is inherent in this type of situation, the alternative is to place an onerous burden on the Government which would severely stifle deportations for violation of Section 241 (a) (13). Moreover, the trier of fact (Immigration Judge) will be able to evaluate the credibility of the alien's explanation in light of all the facts presented.

The record in this case clearly establishes that Pryce was the ringleader of the operation to bring Grizzle into the United States. It was Pryce who made the arrangement for the payments of money, provided the documents for Grizzle, instructed Grizzle how to deceive the Immigration Inspectors at the border, and was wise enough to remove himself from the risk of detection by flying the luggage, return airline ticket and passport into Buffalo, New York.²⁰ Having this in mind and in light of Pryce's failure to come forward with any evidence of his anticipated expenditures or losses incurred, we turn to the record to show the existence of reasonable, substantial, and probative evidence to support the Board's finding of deportability and the frivolousness of Pryce's contention that his actions were motivated out of love, charity and kindness.

¹⁹ In a recent civil tax fraud case, the defendant contended that the Government had the burden to pursue every lead to exculpate him. The Second Circuit disagreed, characterizing the argument as "presumptuous." To quote Judge Wyzanski: "[i]f there is a way 'out of blame' it is the errant taxpayer who must find the avenue of escape from the corner in which he has been caught." *Geller v. Commissioner of Internal Revenue*, Docket No. 76-4248 (2d Cir., decided June 19, 1977). The Government submits that Pryce has painted himself into the same "corner" as that errant taxpayer.

²⁰ The record does not indicate whether Pryce ever returned Grizzle's airline ticket to Jamaica or cashed it in for its monetary value.

C. The Board's finding that Pryce Assisted Grizzle to try to illegally enter the United States for a prospective gain is supported by reasonable, substantial and probative evidence in the record

Under the narrow standard of review enunciated by the Supreme Court in *Woodby, supra*, this Court must decide whether there is reasonable, substantial and probative evidence in the record, when considered as a whole, to support the Board's finding that Pryce's assistance to Grizzle was for an anticipated gain. *Kokkinis v. District Director of the Immigration and Naturalization Service of New York, Jersey and Buffalo, New York*. 429 F.2d 938, 942 (2d Cir. 1970). In reaching this determination, this Court should not pass on the credibility of the witnesses produced "nor make independent findings of fact and conclusions of law upon a *de novo* review." *Id.* The following facts clearly demonstrate that there is reasonable, substantial and probative evidence in the record to support the Board's determination that there was clear, convincing and unequivocal evidence to find Pryce deportable under Section 241(a)(13).

The Government's position that Pryce was acting in anticipation of a gain was based on the cumulative effect of Grizzle's testimony and both the previous sworn statements of Monica and Grizzle which were introduced into evidence. In his testimony before Judge Sacks, Grizzle recounted being told by Monica that it would cost \$300.00 for him to be brought into the United States (AR 39) and that she would pay \$150.00 of this amount. (AR 40). This corroborates Monica's sworn statement in which she stated that Pryce had directed her to pay \$150.00 to him and that Grizzle would pay an additional \$150.00 when Pryce and his confederate arrived in Toronto to pick him up. (AR 136). Moreover, both Monica's

statement (AR 13) and Grizzle's testimony (AR 40) established that prior to Grizzle's illegal entry into the United States neither knew who Grizzle would make his payment to in Canada. However, Grizzle subsequently learned from Monica that he was to have made his payment to Pryce. (AR 43). Based on this evidence in the record it was clear that Pryce anticipated receiving at least \$150.00 and most likely anticipated receiving \$300.00. Pryce's contention that this does not constitute sufficient evidence to support the Board's finding is without merit.

Finally, Pryce claims that his actions were motivated out of "love, charity and kindness" for his "wife", and therefore were not for gain. Brief for Petitioner at 18. Although it is accurate to claim that Section 241(a)(13) was intended by Congress to deport only aliens whose actions were motivated by venal desires and not those desirous to assist their loved ones (*i.e.*, immediate family) to enter the United States illegally,²¹ the relationship between Monica and Carol Pryce chronicled in this record, is surely not the type of "familial-love" relationship that Congress had in mind when it enacted Section 241(a)(13).

²¹ The legislative history behind the adoption of Section 241(a)(13) of the Act indicates that the requirement of "gain" was introduced to avoid deporting aliens who in attempting to assist an immediate relative, were acting out of love for their family. See *In the Matter of R D*, 2 I & N Dec. 758, 759 (AG 1947). In that regard this quote from the United States Senator who was floor manager of the bill introducing this Section of the Act, in which he explains this provision, is enlightening.

It must be for gain, if a father should be found guilty of slipping into the country his son, his wife, or another member of his family, he would not come within this prohibition; but if an alien should sell a passport to another man, and the other man should enter the country on it, the alien would be guilty and deportable.

In the Matter of R-D, *supra* at 760, citing 86 C.R. 8343, 76th Cong., 3d Sess.

Monica married Pryce in 1971 for the sole reason of assisting her to come to the United States. Pryce's brother Barrington, who was living in the United States at the time of Monica's entry, had previously had two children by Monica who were born out of wedlock. From the time of their marriage until the date of her entry in June of 1973, Monica lived exclusively in Jamaica with Grizzle.²² During that time Monica and Grizzle had a child. Before Monica left for the United States she had planned with Grizzle to bring him into this country. When Monica arrived in Rochester she lived in the same apartment with Pryce for one month for the sole purpose of facilitating their charade. She then obtained a new apartment and started preparing for Grizzle's arrival. There is no question that Grizzle intended to live with Monica upon arriving in the United States. And Pryce admits that he had not even met Grizzle until October 1, 1973 when he picked him up in Toronto. For Pryce to expect an Immigration Judge, the Board and this Court to believe that his actions were motivated out of love for Monica or Grizzle is, at best, preposterous.

²² The personal dynamics exposed in this triangular relationship between Monica, Pryce and Grizzle, which arose as a result of Pryce's illegal employment of a marital contract to bring Monica into the United States, proves again the wisdom of Benjamin Franklin's timeless observation that:

where there's marriage without love,
there will be love without marriage.

Poor Richard's Almanac for 1734.

CONCLUSION

This petition for review should be denied.

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July 12, 1977

Respectfully submitted,

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